Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HILLVIEW ESTATES, LTD.,

Petitioner,

vs.

MO-CON VENTURES, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND DISTRICT, SIXTH DIVISION

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. RUSSELL KING, ESQ.
P.O. Box 888
126 North 8th Street
Santa Paula, California 93060
(805) 525-7138

Attorney for Petitioner
HILLVIEW ESTATES, LTD.

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

What merits are there in repondents' brief in opposition to petitioner's petition for writ of certiorari?

LIST OF PARTIES

The parties to the proceedings are petitioner HILLVIEW ESTATES, LTD., a limited partnership, organized under the laws of the State of California, and respondents: MO-CON VENTURES, INC.; GAP DEVELOPMENTS, INC.; TWO C MOBILEHOME SALES, INC.; SECURITY PACIFIC NATIONAL BANK; CHARLES A. GILLIARD; JOSEPH R. ALSIP; ROBERT PLACENCIA; CARROLL D. COURTNIER; EDWARD A. SKIFSTROM; ROBERT D. PATTERSON; and EQUITABLE DEED COMPANY.

TABLE OF CONTENTS

		PAGE
QUESTION PRESENTED	.....	i
LIST OF PARTIES	.....	i
TABLE OF AUTHORITIES	.....	iv
I.	RESPONDENTS HAVE MISSTATED BOTH FACT AND LAW.....	1
A.	THE REPLY MISSTATES THE QUESTION PRESENTED FOR REVIEW.....	3
B.	RESPONDENTS ALSO MISSTATE THE ORIGINAL DATE OF PETITIONER'S REQUEST TO SHORTEN TIME AND TO SPECIALLY SET THE ACTION FOR TRIAL.....	6
C.	RESPONDENTS HAVE MISSTATED THE LAW RE CALIFORNIA RULE OF COURT 209.....	8
II.	THE TRIAL COURT'S RULING OF THE COURT OF APPEAL DECISION WAS MANIFESTLY UNFAIR THEREFORE IT DENIED PETITIONER DUE PROCESS OF LAW.....	10
A.	THE TRIAL COURT APPARENTLY NEVER CONSIDERED PETITIONER'S PETITION FOR AN EXTENSION OF TIME BASED ON A STAY.....	10
B.	THE TRIAL COURT DID NOT STATE ITS BASIS OF DECISION.....	11

PAGE

C. THE DENIAL OF DUE PROCESS BY THE CALIFORNIA COURT OF APPEAL RESULTED FROM ITS FABRICATING ITS OWN EVIDENCE IN LIEU OF THE EVIDENCE PRESENTED IN THE TRIAL COURT..... 12

D. NEITHER THE TRIAL COURT NOR THE COURT OF APPEAL EVER ADDRESSED THE PRIMARY ISSUE, I.E., WAS THE 81 DAY PERIOD IN WHICH PETITIONER'S APPLICATION WAS PENDING IN THE BANKRUPTCY COURT A STAY THAT TOLLED THE PERIOD OF PROSECUTION OF THOSE 81 DAYS?..... 13

III. THIS COURT'S DECISION IS REQUIRED TO ASSURE THAT CALIFORNIA COURTS COMPLY WITH THE LAW OF STATUTES OF LIMITATIONS AND THEIR LAWFUL EXCEPTIONS..... 14

A. CALIFORNIA COURTS HAVE INTERPRETED STATUTES OF LIMITATION ACCORDING TO EACH JUDGE'S OPINION-- NOT ACCORDING TO LAW..... 14

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

CASES

Davis v. Thayer (1980)
113 Cal.App.3d 892, 903;
170 Cal.Rptr. 328 18

Hocharian v. Los Angeles
Superior Court (1981)
28 CA3d 714;
170 Cal. Rptr. 790;
621 P2d 829 .....15, 16

Kayes v. Mount La Jolla Homeowners
Assn. (1988) 199 Cal.App.3d 111, 122;
modified in 204 Cal.App3d 1476 ...7, 8

Salas v. Sears, Roebuck & Co.
(1986) 42 Cal.3d 342,
228 Cal. Rptr. 504 ..... 4, 5

Swartzman v. Superior Court In and For
Los Angeles County (1965) 41 Cal.Rptr.
721; 231 CA2d 195..... 9

FEDERAL STATUTES

11 USC 327(e) 14

STATE STATUTES

California Code of Civil Procedure

§583.340(a) 3, 20

§583.340(b) 4, 5, 20

§583.340(c) 4, 5, 6, 20

PAGE

California Rules of Court

Rule 209 ..... 8, 10

Rule 218 9

No. 88-1557

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

HILLVIEW ESTATES, LTD.,
a limited partnership,
Petitioner,

vs.

MO-CON VENTURES, INC.,
GAP DEVELOPMENTS, INC.,
TWO C MOBILEHOME SALES, INC.,
SECURITY PACIFIC NATIONAL BANK,
CHARLES A. GILLIARD,
JOSEPH R. ALSIP,
ROBERT PLACENCIA,
CARROLL D. COURTNIER,
EDWARD A. SKIFSTROM,
ROBERT D. PATTERSON, and
EQUITABLE DEED COMPANY,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. RESPONDENTS HAVE MISSTATED BOTH FACT AND LAW.

Petitioner "HILLVIEW" replies to the brief in opposition to petitioner's

petition for writ of certiorari by respondents, SECURITY PACIFIC NATIONAL BANK, ROBERT D. PATTERSON, and EQUITABLE DEED COMPANY. No other respondent objected to that petition. Therefore, all of these respondents are collectively sometimes referred to herein as "SECURITY."

At page i of the opposition, respondents state that the only question presented for review concerns petitioner's burden "of proving its diligence in all stages of the proceeding." That is erroneous as shown in petitioner's petition for writ of certiorari ("petition") pages 33-36. Petitioner is not required to show due diligence of prosecution of its action to obtain the 81-day extension of time beyond the five-year period for bringing its action to trial because there was an implied-in-law stay of the action.

All of respondents' arguments are irrelevant in referring to diligence of prosecution and the impossible, impracticable, and futile basis for extension of time to bring an action to trial. Thus, those arguments are without merit.

A. THE REPLY MISSTATES THE QUESTION PRESENTED FOR REVIEW.

For the convenience of the reader the provisions of extending time beyond the five-year limit for bringing an action to trial are quoted again at this point.

> "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
>
> "(a) The jurisdiction of the court to try the action was suspended.

"(b) Prosecution or trial of the action was stayed or enjoined. (Emphasis added.)

"(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Emphasis added.) CCP §583.340

That section is correctly quoted by respondents in their opposition in Appendix 1 (their only appendix).

Note: the word "other" in (c) above was inadvertently omitted at page 16 of petitioner's petition. The reader is requested to insert that word, "other" where shown. Also on page viii of that petition at page 16 should be inserted in the index to show that that section was quoted there.

The provisions for an extension of time based on the impossible, impracticable, or futile provisions (that under Salas v. Sears, Roebuck &

Co. (1986) 42 Cal.3d 342, 228 Cal. Rptr. 504, require a showing of diligence of prosecution) are not applicable to either the suspension of jurisdiction of part (a) or the stay provision of (b). That is obvious by the use of the word, "other" in part (c) that indicates it applies only when either parts (a) and (b) do not apply.

As set forth in petitioner's petition for writ of certiorari, pages 33-36, no requirement of diligence need be shown in prosecution for a period of time tolled because there was an implied-in-law stay of 81 days. That extends time under the provisions of CCP §583.340(b). Respondents obfuscate the issue by their discussion, pages 2, 3, and 4 of the requirement for diligence to be shown at all stages of the proceeding in order to use the provision of CCP

§583.340(c), the impossibility, impracticability, or futility basis for an extension of the five-year period for bringing an action to trial. Therefore, all cases cited by respondents in their opposition are irrelevent. That stay occurred during the five-year period (January 7, 1982, to January 7, 1987). The tolled time is added to the five-year period no matter when during the five year period the tolled time occurred.

B. RESPONDENTS ALSO MISSTATE THE ORIGINAL DATE OF PETITIONER'S REQUEST TO SHORTEN TIME AND TO SPECIALLY SET THE ACTION FOR TRIAL.

At page i of the objection in its question presented for review respondents state that petitioner waited until five years and thirty-seven days until bringing its motion to specially set the case for trial.

Respondents refer to page 8 of petitioner's petition for that statement. To the contrary, on page 7 of petitioner's petition for writ of certiorari, petitioner stated that on December 17, 1986 (22 days before the five-year period ended) it filed its motion to shorten time and to specially set the trial date on January 2, 1987, or five days before the five year period ended on January 7, 1987.

Further, the motion need not be made within the five year period after filing a complaint; it is made within the period of the five-year period plus the tolled period of time. Thus, here it must have been made before March 29, 1987, the date the end of the five-year period was extended for a period of 81 days. See Kayes v. Mount La Jolla Homeowners Assn. (1988)

199 Cal. App.3d 111; modified in 204 Cal.App3d 1476. The second citation did not change the holding, where the motion to specially set the case for trial was made November 25, 1986, one day after the five-year period ended November 24, 1986. There, the appellate court reversed the trial court's dismissal of the action because the motion to specially set was brought within a five-year period plus the tolled time for the period that Kayes sought an extraordinary writ review of the summary adjudication order of the court.

C. RESPONDENTS HAVE MISSTATED THE LAW RE CALIFORNIA RULE OF COURT 209.

Page 1 of respondents' opposition states that California Rule of Court 209 required that an at-issue memorandum to set for trial be filed "as a condition

precedent to the Court's assigning a trial date..." That is a misstatement of the law. California Rule of Court 218 states that:

> "The court may shorten the time to prevent a dismissal under chapter 1.5 (§583.110 et seq.) [this includes CCP §583.340(a)(b)(c)] of title 8 of part 2 of the Code of Civil Procedure or for other good cause shown on noticed motion. The setting for trial shall be by the presiding judge or the presiding judge's designee." Rule 218.

Also see Swartzman v. Superior Court In and For Los Angeles County (1965) 41 Cal.Rptr. 721; 231 CA2d 195, as petitioner stated in its notice of motions, etc. heard March 17, 1987. There, the court stated that:

> "Procedure for special setting by trial judge of case for trial and pretrial is not required to conform in all respects to rules for filing and notice which apply to routine setting by the clerk." 231 CA2d 195,199.

Therefore, the trial court, without requiring petitioner to file the at-issue memorandum of Rule 209, should have shortened time to permit petitioner to bring its action to trial. Thus, petitioner applied within time, when on December 17, 1986, petitioner filed its motion to shorten time, and for special trial setting originally to be heard on January 2, 1987, five days before the expiration of the five-year period.

II. THE TRIAL COURT'S RULING OF THE COURT OF APPEAL DECISION WAS MANIFESTLY UNFAIR THEREFORE IT DENIED PETITIONER DUE PROCESS OF LAW.

A. THE TRIAL COURT APPARENTLY NEVER CONSIDERED PETITIONER'S PETITION FOR AN EXTENSION OF TIME BASED ON A STAY.

Nothing in the record shows that the court considered petitioner's request for extension of time for trial based on the stayed period of 81 days.

That court merely held that a stay did not occur but stated no reason for that holding.

B. THE TRIAL COURT DID NOT STATE ITS BASIS OF DECISION.

The trial court denied petitioner due process because it failed to provide a basis of decision. It either required diligence to be shown during the five-year period that the action was pending in the Ventura County Superior Court between January 7, 1982, and January 7, 1987, or it considered the hearsay on hearsay statement of JILL L. JASPER (petitioner's Appendix "E" to its petition) of the usual procedures of the bankruptcy court in processing an Application to Employ Attorneys that would require only several weeks. Nothing was ever shown by respondent, or by anyone else,

that accounted for the 81-day delay between the mailing of that Application on July 8, 1982, and its approval by the bankruptcy judge, September 27, 1982. As stated in petitioner's petition for writ of certiorari, the doctrine of res ipsa loquitor shows that any negligence was on the part of the bankruptcy court and/or the trustee (petition, pp.24-26.)

C. THE DENIAL OF DUE PROCESS BY THE CALIFORNIA COURT OF APPEAL RESULTED FROM ITS FABRICATING ITS OWN EVIDENCE IN LIEU OF THE EVIDENCE PRESENTED IN THE TRIAL COURT.

Again, petitioner submits that when the trial court stated in its Decision as quoted in petitioner's petition for writ of certiorari at Appendix "B," pages B-4 and B-5, there is no evidence that petitioner had a control--or caused any delay--in

the processing of its Application in the bankruptcy court. Petitioner attempted to show the Court of Appeal that the court had egregiously erred by its petition for rehearing, and its request for findings of fact (petition: Appendix "F").

It was manifestly unfair for the Court of Appeal to fabricate evidence in holding that petitioner was responsible for the 81-day implied-in-law stay of proceeding while its Application was pending in the bankruptcy court. That clearly is a denial of due process of law.

D. NEITHER THE TRIAL COURT NOR THE COURT OF APPEAL EVER ADDRESSED THE PRIMARY ISSUE, I.E., WAS THE 81 DAY PERIOD IN WHICH PETITIONER'S APPLICATION WAS PENDING IN THE BANKRUPTCY COURT A STAY THAT TOLLED THE PERIOD OF PROSECUTION OF THOSE 81 DAYS?

Neither the trial court nor the Court of Appeal indicated whether or not the 81 days was a stay of proceeding qualifying petitioner an extension of that period for bringing its action beyond the five-year period. Therefore, the court's ruling would clarify the federal law under 11 USC 327(e) as to the effect of the delay caused by the bankruptcy court in processing a bankrupt's Application to Employ Attorneys.

III. THIS COURT'S DECISION IS REQUIRED TO ASSURE THAT CALIFORNIA COURTS COMPLY WITH THE LAW OF STATUTES OF LIMITATIONS AND THEIR LAWFUL EXCEPTIONS.

A. CALIFORNIA COURTS HAVE INTERPRETED STATUTES OF LIMITATION ACCORDING TO EACH JUDGE'S OPINION--NOT ACCORDING TO LAW.

Despite the statutory setting forth various time periods

and exceptions thereto, the California courts have ignored both statutory law and case law. That authority to was set forth in Hocharian v. Los Angeles Superior Court (1981) 28 CA3d 714; 170 Cal. Rptr. 790; 621 P2d 829 regarding CCP §581(a). That section then required a summons and a copy of a complaint to be served, and return made, within three years after the action was filed. There, the summons was served "some nine weeks after the expiration of the three years summons service period provided for in Code of Civil Procedure §581(a)." Op. cit, 718. The California Supreme Court stated that a three year statute need not be complied with. The court in an opinion by Chief Justice Bird stated:

"[O]nce a plaintiff has proven his use of reasonable diligence, the trial court still has discretion to dismiss as to the defendant pursuant to section 581a. In exercising this discretion the court must be aware of the fact that it is dealing with two essentially innocent parties--a plaintiff who has demonstrated reasonable diligence and a defendant who has only recently been given notice of the lawsuit. The court must also keep in mind the strong public policy that litigation be disposed of on the merits wherever possible. (Citations omitted.)

"The decision whether or not to dismiss must be based on a balancing of the harm to the plaintiff if the motion is granted against the prejudice to the defendant if he is forced to defend the suit. As long as the court engages in this balancing process, its decision should not be disturbed on appeal absent an abuse of discretion." (Citation omitted.) Hocharian v. Superior Court (1981) 28 CA3d 714; 170 Cal Rptr. 790; 621 P2d 829.

Obviously, the only way to determine whether or not a court had abused its discretion is to appeal the

decision of the lower court. Every judge may have a different opinion as to that balancing process. The result of that decision was to replace certainty of time with uncertainty thereby causing confusion in both Bench and Bar, and to exacerbate an antagonism toward the Bird court by both Bench and Bar. It also encouraged other actions to be appealed from trial courts because any ruling contrary to statutory and case law might be obtained from the California Supreme Court because that decision was such a one. This court may take judicial notice that Justice Bird, who wrote that opinion, together with Justices Grodin and Reynoso (both of whom had later replaced two of the judges who where on the court when that decision was written) were removed by the voters of California in the elections in

November, 1986.

In Davis v. Thayer (1980) 113 Cal.App.3d 892, 903; 170 Cal.Rptr. 328, discussed by petitioner in its petition pages 30-32, neither party in that case raised the possibility that the Government Code had any application to the Code of Civil Procedure. The court raised that part sua sponte. Those two cases, and this case, show the need for certainty in California for cases involving a statue of limitation.

The motto of this court is, "Equal Justice Under Law." It is not "Equal Justice," because without law many persons us will have different opinions of what constitutes justice. It is obvious that the rules must be set forth and be known to the people. As shown above, petitioner submits the rules of law-- that of evidence-- were not followed

by the trial court nor by the Court of Appeal.

CONCLUSION

The opposition of respondents is without merit in every respect. They misstate the basis of petitioner's petition by asserting that diligence must be shown during prosecution, and misstate the law regarding an at-issue memorandum to set for trial.

Petitioner was denied a fair hearing in the trial court that denied petitioner a tolled period of time of 81 days to extend the time for bringing an action to trial; no reason for its decision was stated by that court.

The Court of Appeal then exacerbated the lack of due process by fabricating evidence that was not before the court as to the progress in the bankruptcy court of petitioner's attorney's

Application for their employment.

The state of the law in California with regard to statutes of limitations is uncertain and confusing.

A decision in this case by granting petitioner's petition for writ of certiorari would aid California in restoring the rule of law in judicial interpretation of all statutes of limitations in general, and to matters for extension of time under CCP §583.340 in particular. It would also return to petitioner that due process of law that it was denied by the trial court and the Court of Appeals in the actions herein.

DATED: April 21, 1989

Respectfully submitted,

C. RUSSELL KING